FILED
Sep 9 1982
Phillip B. Winberry
Clerk,U.S.Court of
Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ISABEL WOOD, a single woman; and JONATHAN L. HAAS, a single man,	)	
Plaintiffs-Appellants,	)	No. 81-5594
vs.	)	D.C. No. CV 81-58 PHX VAC
CHARLES H. LEIST, JR., and LAURA N. LEIST, husband and wife, et al.,	)	
Defendants-Appellees,	)	MEMORANDUM

Appeal from the United States District Court
for the District of Arizona
Honorable Valdemar A. Cordova, District Judge, Presiding
Argued and Submitted July 8, 1982

Before: GOODWIN and NELSON, Circuit Judges, and PRICE,* District Judge

Isabel Wood and Jonathan Haas, appearing in propria persona in Arizona district court, filed civil rights claims under 42 U.S.C.

* Honorable Edward Dean Price, United States District Judge, Eastern District of California, sitting by designation.

SS 1983, 1985(2) & (3), and 1986, and pendent state claims. The district court granted summary judgment in favor of one defendant, Charles Leist, and dismissed plaintiffs' suit as to the remaining defendants for failure to state a claim upon which relief can be granted. Wood and Haas appealed from the judgments, as well as the district court's denial of Haas' motion to disqualify opposing counsel for a conflict of interest. We affirm.

The conduct underlying these claims occured in conjunction with a civil action in the Arizona state courts. Police officer Charles Leist was suing real estate salesperson Wood over a real estate transaction. Wood planned to call Haas, her employing broker, to testify in her behalf. At some time prior tp Haas' appearance in the courtroom, Officer Leist had run a criminal records check on the parties opposing him and their likely witnesses. Leist discovered that there was an outstanding bench warrant from another Arizona

county, seeking Haas' arrest for failure to appear on a traffic violation.

When Haas arrived in the courtroom, Leist went to a telephone, called his co-workers on the Phoenix Police Department, and reported Haas' presence through the "Crime Stop" program. While the court was in a brief recess, two uniformed officers appeared in the courtroom to arrest Haas. Haas protested that the traffic charge had been taken care of and that the warrant must have been issued in error. His protestations were ignored; he was arrested and removed from the courtroom.1/

When the judge in the civil action discovered that Haas had been arrested during the recess, he recessed the trial for a month. Upon resumption of the trial, Wood did not call Haas, make any objection or reference to his absence, or request a further continuance.

Wood and Haas then filed this action in district court. The thrust of their claims was that Leist abused his authority as a public

officer by searching the police records and by using information gained thereby for improper private purposes: to deprive Wood of due process by intimidating Haas from testifying on her behalf, and to deprive Haas of due process by instigating and making an unreasonable attest. Wood and Haas further alleged that Leist conspired with the following persons to deprive Wood and Haas of their civil rights: Robert Jones, Leist's attorney in the underlying Arizona civil action; Ronald Roth, another real estate agent involved in the Arizona civil suit; and Hugh Hull, Roth's attorney.2/

Following the filing of plaintiffs' first amended complaint, Leist moved for summary judgment on all counts; the district court granted that motion. The district court then granted Rule 12(b)(6) motions filed by the remaining defendants and dismissed Wood and Haas' complaint for failure to state a claim.

On appeal Wood and Haas argue that the district court erred in concluding as a matter

of law that they could not prevail on their federal civil rights claims, and that the district court therefore erred in dismissing their pendent state claims. Haas also appeals the district court's denial of his motion to disqualify opposing counsel for a conflict of interest.

STANDARD OF REVIEW

In reviewing the district court's grant of summary judgment in favor of defendant Leist, this court need decide only whether any genuine issue of material fact remains for trial and whether the substantive law was correctly applied. Gains v. Haughton, 645 F.2d 761, 770 (9th Cir. 1981), cert. denied, 102 U.S. 1006 (1982). Aruling on a motion to dismiss for failure to state a claim is also a question of law, freely reviewable on appeal. Such a motion should not be granted unless it appears to a certainty that plaintiffs would be entitled to no relief under any state of facts that could be proven. Alonzo v. ACF

Property Management, Inc., 643 F.2d 578, 579 (9th Cir. 1981). In reviewing both the motion for summary judgment and the motions to dismiss, the allegations of the complaint should be construed favorably to the pleader. Gains, 645 F.2d at 770.

DISCUSSION

I. The District court correctly concluded as a matter of law that plaintiffs could not prevail on their claims of violation of 42 U.S.C. § 1985(2) & (3) because the necessary class-based, invidiously discriminatory animus was lacking.

Section 1985(2) is divided into two clauses, the latter of which is applicable here, because the underlying conduct occured in conjunction with an Arizona state court proceeding. This clause is concerned with private conspiracies to obstruct justice "in any State ot Territory, with the intent to deny to any citizen the equal protection of the laws." 42 U.S.C. § 1985(2)(cl. 2). To be

actionable under this clause, a conspiracy must involve a racial or class-based invidiously discriminatory animus. Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1355 (9th Cir. 1981), cert. granted, 50 U.S.L.W. 3998.27 (U.S. June 29, 1982)3/

Section 1985(3) is concerned with conspiracies to deprive "any person or class of persons of the equal protection of the laws." See Griffin v. Breckenridge, 403 U.S. 88, 91 (1971). Section 1985(3) conspiracies, as well, must involve a racial or class-based invidiously discriminatory animus. Life Insurance Co. of North America v. Reichardt, 591 F.2d 499, 505 (1979).

Wood and Haas have attempted to frame their claims in the first amended complaint to make out witnesses intimidated by police officers as a class that is invidiously discriminated against. This purported class, however, has no common characteristics setting it apart from the remainder of the population;

it can only be identified by reference to the acts of others. This circuit has held such an animus to be insufficient. Lopez v. Arrowhead Ranches, 523 F.2d 924, 928 (9th Cir. 1975); see Note, The Class-Based Animus Requirement of 42 U.S.C. § 1985(c): A Suggested Approach, 64 Minn. L. Rev. 635, 649-50 (1980).

Although defendants may well possess an animus toward Wood and Haas, it is personal and specific, not class-based. We conclude that the district court correctly determined as a matter of law that plaintiffs could not succeed in their section 1985(2) & (3) claims.

II. The district court correctly concluded as a matter of law that there was no violation of 42 U.S.C. § 1986, because that section requires that a valid section 1985 claim be stated.

Section 1986 makes actionable the neglect or refusal, by a person with the power to prevent any of the wrongs mentioned in section 1985, to take positive action, where the

circumstances demand, to prevent those wrongs. Taylor v. Nichols, 558 F.2d 561, 568 (10th Cir. 1977). If there is no actionable conspiracy under 42 U.S.C. § 1985, no claim can be maintained under 42 U.S.C. § 1986. Id.; Phillips v. International Association of Bridge, Structural & Ornamental Iron Workers, Local 118, 556 F.2d 939, 941 (9th Cir. 1977).

Because the district court correctly concluded as a matter of law that no section 1985 claim could be maintained due to the absence of a class-based, invidiously discriminatory animus, the district court was also correct in granting judgment against plaintiffs on their § 1986 claims.

III. The district court correctly concluded as a matter of law that there were no violations of 42 U.S.C. § 1983.

There are two essential elements to a section 1983 claim: whether the conduct complained of was committed by a person acting under color of state law; and whether this

conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535 (1981); Adickes v. Kress & Co., 398 U.S. 144, 150 (1970). The Supreme Court has said that "[t]he first inquiry in any § 1983 suit . . . is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws [of the United States].'" Baker v. McCollan, 443 U.S. 137, 140 (1979).

Wood and Haas argue that an otherwise valid arrest, if done for a malicious or improper purpose such as intimidating a witness rises to the level of a constitutional deprivation actionable under the civil rights statutes. We believe that Baker v. McCollan forecloses that argument. Absent an attack on the validity of the warrant, no deprivation of a constitutional right occured in this case.4/ See Smith v. Gonzales, 670 F.2d 522, 527 (5th Cir. 1982)(bad faith motive to "get" suspect irrelevant if arrest supported by properly issued warrant); Beauregard v. Wingard,362 F.2d 901, 903 (9th Cir. 1966)(maliciously inspired

investigation did not sustain section 1983 claim where probable cause to arrest found).

This is not to say that we approve of defendants' alleged conduct. We say only that Wood and Haas should look to state law for their remedy. Baker v. McCollan, 443 U.S. at 146.

IV. The district court did not err in dismissing the plaintiffs' pendent state claims.

In addition to their federal civil rights claims, Wood and Haas alleged that the defendants were engaged in a conspiracy to obstruct justice, which appellants alleged is actionable under federal common law5/ and the common law of Arizona. Wood and Haas further alleged that defendants' actions violated the privacy clause of the Arizona Constitution.6/ In entering judgment against Wood and Haas on their pendent state claims, it appears that the district court was following the rule of United Mine Workers v. Gibbs, 383 U.S. 715, 726

(where federal claim dismissed before trial, pendent state claims should often be dismissed as well); Traver v. Meshriy, 627 F.2d 934, 939 (9th Cir. 1980). Dismissal of such pendent state claims is within the discretion of the district court. Traver, 627 F.2d at 939. We find no abuse of discretion here.

V. The district court's denial of Haas' motion to disqualify opposing counsel was harnless error.

One month after the complaint was filed, plaintiff Haas moved to disqualify opposing counsel, on the ground that John J. Bouma and his firm of Snell & Wilmer, who represent defendant Jones in this action, had previously represented Haas in another matter. The opposition replied that as there was no substantial relationship between the prior matter and the current litigation, the motion should be denied. Haas then argued that Bouma and his law firm had obtained confidential information adverse to Haas and helpful to the defendants.

Bouma stated at the hearing that he had not "come into any information of any kind or notes that were not included in the Answers to Interrogatories that were publicly filed with the Court." Haas replied that several telephone conversations between Bouma and himself concerned matters not on the public record. Haas continued: "I do believe because of this he possesses an insight into my background and personal information which would be advantageous to his clients in this action, and disadvantageous to me, and therefore should not be allowed to represent the other side."

The court denied Haas' motion to disqualify opposing counsel. The court gave no reason for its decision.

Unified Sewerage Agency v. Jelco Inc., 646 F.2d 1339 (9th Cir. 1981), states this circuit's rule: where the district court has adopted as its rules the disciplinary rules of the state bar of the state in which it sits, the appellate count's inquiry must be concerned

with whether the district court correctly applied the state rules. Id. at 1342 n.1. Rule 7(d) of the U.S. District Court, District of Arizona (West 1981), adopts the Code of Professional Responsibility as set forth in Rule 29(a) of the Rules of the Arizona Supreme Court.

The Arizona Supreme Court does not appear to have ruled on the circumstances under which counsel should be disqualified. In the absence of such a definitive interpretation of state law from the state's highest court, substantial deference is given to the district court's construction of the law of the state in which it sits. Normally, the district court will not be reversed on appeal unless its interpretation is clearly erroneous. Gaines v. Haughton, 645 F.2d at 770.

Haas relies primarily on the 1970 Arizona appellate case of Associated Finance Corp. v. Walters, 12 Ariz.App. 369, 470 P.2d 689 (1970):

> As a general rule, an attorney can and should be disqualified from representing interests adverse to a former client when the former client objects, . . . if the attorney has obtained information from the prior representation which would be adverse to the former client's interest or helpful to the present client, or if the present litigation is substantially related to matters of past representation.

Id. at ___,(sic)470 P.2d at 694. Under Associates Finance, if Bouma obtained information adverse to his former client, he should have been disqualified.

Haas' position is strengthened by Chugach Electric Association v. United States District Court, 370 F.2d 441 (9th Cir. 1966), cert. denied, 389 U.S. 820 (1967), in which an attorney was disqualified because there was a likelihood that in his prior representation the attorney had gained knowledge of confidential matters that would provide him with "greater insight and understanding of the significance of subsequent events . . . and offer a promising source of discovery." Id. at 443.

Defendant Jones and his attorneys rely on the earlier Arizona appellate case of Nichols v. Elkins, 2 Ariz.App. 272, 408 P.2d 34 (1965),

a case not discussed by the Associates Finance court. In discussing the principle that bars an attorney from representing an interest adverse to that of a former client, the Nichols court stated that "[a]n attorney's acceptance of employment, however, to act in opposition to his former client is not ipso facto improper. The attorney is not disqualified if his subsequent employment has no reference to the matters with which the previous attorney-client relationship was concerned." Id. at ___,(sic) 408 P.2d at 39.

We do not read this language from Nichols so narrowly as do defendants. It is clear to us that where a party alleges that his former attorney actually gained confidential information adverse to his former client's interests, even a complete dissimilarity between the former and present matters will not prevent the attorney's disqualification.

With this in mind, we review the district court's ruling on the motion for disqualification under the abuse of discretion standard.

Unified Sewage Agency, 646 F.2d at 1351. The parties disagree as to whether Bouma and Snell & Wilmer possessed confidential information adverse to the interests of Haas. Bouma's assertion that he possessed no such confidential information was squarely contradicted by Haas. We agree with Haas that the party seeking disqualification "does not have the burden of specifying the secret and confidential information which was available to [opposing counsel]." Chugach, 370 F.2d at 444.

Thus we bwlieve that Haas carried any necessary burden regarding disqualification. To avoid even the appearance of impropriety, the district court should have disqualified Bouma.

Because we affirmed the district court's decisions on the merits, however, we consider whether its refusal to disqualify opposing counsel was harmless error. There is no indication that Haas was prejudiced in any way. As this "error" did not affect the substantial

rights of the parties, we disregard it. Gray v. Shell Oil Co., 469 F.2d 742, 751-52 (9th Cir. 1972), cert. denied, 412 U.S. 943 (1973); Goodman v. United States, 398 F.2d 879 (9th Cir. 1968); 7 J. Moore & J. Lucas, Moore's Federal Practice, _ 61.11 (2d ed. 1982).

CONCLUSION

The district court correctly granted judgment against plaintiffs Wood and Haas on their federal civil rights claims brought under 42 U.S.C. §§ 1983, 1985(2) & (3), and 1986. Furthermore, the district court did not abuse its discretion in dismissing plaintiffs' pendent state claims.

In light of its correct decisions on the merits and because the substantial rights of the parties were unaffected, the district court's refusal to disqualify opposing counsel was harmless error. The judgments are AFFIRMED.

FOOTNOTES

1. During Haas' removal from the courtroom, a scuffle occured; Haas was charged with attempting to resist arrest. He was acquitted.

2. The complaint also named the spouse of each defendant, presumably in an attempt to reach community assets.

3. The Supreme Court granted certiorari to resolve a split in the circuits over the construction of the first clause of 42 U.S.C. § 1985(2), which is concerned with conspiracies to obstruct justice or to intimidate any party or witness in federal court. The question presented to the Supreme Court is whether claims under the first clause of section 1985(2) must involve a class-based invidiously discriminatory animus, as must claims under the second clause of that section. 50 U.S.L.M. 3998.23 (1982); see 51 U.S.L.W. 3009 (1982). The D.C., Third, and Ninth Circuits do not require a class-based animus; the Fifth and Eighth Circuits do, however. Rutledge, 660 F.2d at 1354 & n.3.

4. We have found only one case, Lessman v. McCormick, 591 F.2d 605, 611 (10th Cir. 1979), which states that an arrest pursuant to a valid warrant might be actionable under section 1983, if the arrest were an abuse of power. The Lessman court read Pearson v. Ray, 386 U.S. 547 (1967), "as support for the proposition that an arrest which might be lawful on its face can be an abuse of power, condemned by the Civil Rights Act, if done for an improper purpose." 591 F.2d at 611. Lessman, however, was decided prior to Baker McCollan.

5. This claim appears wholly frivolous. See C. Wright Law of Federal Courts 278-86 (3d ed. 1976)

6. "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Ariz. Const. art. II, § 8.

LODGED
JUN 17 1981 /s/KK
Office of the Clerk
U.S.District Court
District of Arizona

FILED
JUN 19 1981
W.J.Forstenau, Clerk
United States District Court
For The District of Arizona
By /s/KK
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ISABEL WOOD, a single woman; and JONATHAN L. HAAS, a single man,	NO. CIV. 81-58 PHX-VAC
Plaintiffs,	JUDGMENT
vs.	
CHARLES H. LEIST, JR., and LAURA N. LEIST, husband and wife, RONALD E. ROTH and LINDA ROTH, husband and wife; ROBERT E. JONES, JR., and MARLYN JONES, husband and wife; HUGH W. HULL and LYNNE HULL, husband and wife,	
Defendants.	

Defendant Leist's Motion for Summary Judgment and plaintiffs' Cross Motion for Summary Judgment on Count V of the First Amended Complaint having come on for hearing

this 15th day of June 1981, before this Court, the Court having reviewed the Motions and having heard oral argument thereon and being fully advised in the premises,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that defendants Leist's Motion for Summary Judgment be and the same is hereby granted, that plaintiffs' Complaint be dismissed, and that plaintiffs take nothing from defendants Leist thereby.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs' Cross Motion for Summary Judgment on Count V of the First Amended Complaint be and the same is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants Leist have and collect their lawfully taxable costs, together with interest thereon at the rate of ten percent (10%) per annum from the date of the judgment until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court specifically finds that there is no just cause for delay and that the judgment

should be entered herein forthwith, pursuant to Rule 54 (b), Federal Rules of Civil Procedure.

DONE IN OPEN COURT, this 18th day of June, 1981.

sig/ Valdemar A. Cordova

The Honorable Valdemar A. Cordove
Judge of the United States District
Court for the District of Arizona

Copy of the foregoing mailed this
17th day of June 1981 to:

Ms. Isabel Wood and
Mr. Jonathan L. Haas
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In Propia Persona

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By sig/ Diane M. Evans

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FILED
JUN 29 1981
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Attorneys for Defendant Jones

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ISABEL WOOD, a single woman;and JONATHAN L. HASS, a single man, Plaintiffs, vs. CHARLES H. LEIST, JR. and LAURA N. LEIST, husband and wife, Defendants.	NO: CIV 81-58 PHX VAC JUDGMENT

Defendants Jones' Motion to Dismiss the Second Amended Complaint having come on for hearing on June 22, 1981 before this Court, the Court having reviewed the Motion and hearing oral argument thereon, and being fully advised in the premises and finding the defend-

ants Jones' Motion well-taken:

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that defendants Jones' Motion to Dismiss be and the same is hereby granted, that plaintiffs' Second Amended Complaint be dismissed, and that plaintiffs take nothing thereby.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED than defendants Jones have and recover their lawfully taxable costs, together with interest thereon at the highest legal rate from the date of the Judgment until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED denying defendants Jones' request for attorneys' fees pursuant to 42 U.S.C. § 1988.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the court specifically finds that there is no just cause for delay and that Judgment should be entered herein forthwith, pursuant to Rule 54(b), Federal Rules of Civil Procedure.

DONE IN OPEN COURT this 26th day of June,

1981.

/s/ Valdemar A. Cordova
HONORABLE VALDEMAR A. CORDOVA
Judge of the United States
District Court

Copy of the foregoing mailed
this 25th day of June, 1981,
to:

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By /s/ Beth Melcher

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LODGED
JUN 30 1981 /s/KK
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District of Arizona

FILED
JUL 8 1981
W.J.Furstenau, Clerk
United States District
Court
For The District of
Arizona
By /s/ KK
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ISABEL WOOD, a single woman; and JONATHAN L. HAAS, a single man, Plaintiffs, vs. CHARLES H. LEIST, JR., and LAURA N. LEIST, husband and wife; RONALD E. ROTH and LINDA ROTH, husband and wife; ROBERT E. JONES, JR. and MARLYN JONES, husband and wife; HUGH W. HULL and LYNNE HULL, husband and wife, Defendants.	No. CIV. 81-58 PHX-VAC JUDGMENT

Defendants Hull's Motion for Summary Judgment and Plaintiffs' Cross Motion for

Summary Judgment on Count V of the First Amended Complaint having come on for hearing this 15th day of June, 1981, before this Court, the Court having reviewed the Motions and having heard oral argument thereon and being fully advised in the premises,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Defendants Hull's Motion for Summary Judgment be and the same is hereby granted, that Plaintiffs' Complaint be dismissed, and that Plaintiffs take nothing from Defendants Hull thereby.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Court specifically finds that there is no just cause for delay and that judgment should be entered herein forthwith, pursuant to Rule 54(b), Federal Rules of Civil Procedure.

DONE IN OPEN COURT, this 7th day of July, 1981.

/s/ Valdemar A. Cordove
The Honorable Valdemar A. Cordove
Judge of the United States District
Court for the District of Arizona

COPY of the foregoing
mailed this 30 day
of June, 1981, to:

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By /s/Fuell